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NO. 82-2057

THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

DONALD LESIAK,

Petitioner,

vs.

THOMAS E. FERGUSON,

AUDITOR OF THE STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio Courts correctly applied to the facts of this case, the balancing test to be used where a public employee is discharged for speech conduct, as set forth by this Court in Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968).

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STATEMENT OF THE CASE

This matter arose under Ohio Revised Code Chapter 124, The Civil Service Act (hereinafter "R.C.") and R.C. Chapter 119, the Administrative Procedures Act. The State Personnel Board of Review ("Board") affirmed the decision of the Appointing Authority, Thomas E. Ferguson, Auditor of State (respondent, here) to remove petitioner Lesiak from his position of employment, on grounds of insubordination, after a full, fair and impartial hearing. The Order of the Board adopted the Report and Recommendation of Hearing Officer, John S. Jones. [Petitioner's Appendix, A53].

Petitioner appealed the Order of the Board to the Court of Common Pleas, Cuyahoga County, Ohio, which after full briefing, oral argument, additional testimony, and review of the administrative record, affirmed the Order of Removal of the Board. [Petitioner's Appendix, A27].

Petitioner appealed that decision to the Court of Appeals for the Eighth Appellate District, Ohio, which after being briefed, reviewing the record, and hearing oral argument, affirmed the Common Pleas Court's decision. 4 Ohio App. 3d 244 (1982). [Petitioner's Appendix, A2].

The Hearing Examiner's Report, the decision of the Common Pleas Court, and the decision of the Court of Appeals each discussed the "balancing test" set forth by this Court in Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 811, 88 S. Ct. 1731 (1968) and its application to the facts presented in this case.

Petitioner filed a Memorandum in Support of Jurisdiction with the Supreme Court of Ohio. Respondent filed a Memorandum Opposing Jurisdiction urging that Court to deny said motion for the reasons that the Court of Appeals' decision was a correct application of the law to the facts of this case; that the Court of Appeals made no mistakes and avoided no legal issues in reaching its correct and well-reasoned decision, and that the Court of Appeals correctly applied federal constitutional law and

and Ohio administrative law to this case, including the Pickering, supra balancing test.

The Supreme Court of Ohio, by Judgment and Opinion, March 16, 1983, dismissed the appeal for the reason that no substantial constitutional question existed. [Petitioner's Appendix, A1].

STATEMENT OF THE FACTS

The petitioner, Donald Lesiak, was employed by the Auditor of State as a State Examiner Supervisor I and was removed from his position effective May 4, 1979. The Order of Removal was based upon petitioner's three hour interview with a news reporter and his preparation and distribution of a fifty-six page document, including attachments, to the publisher and editor of the Cleveland Plain Dealer, a newspaper of general circulation, in Cleveland, Ohio.

These actions constituted a direct violation of the press relations policy of the Auditor of State. This policy provided that Examiners should not discuss pending or completed audits with members of the press; requests for information by the news media should be referred to the Auditor of State's Public Relations Department. Based upon these violations of the press relations policy, the Auditor of State removed the petition for "insubordination" pursuant to R.C. §124.34.

As testified to by the Auditor of State and Mr. Paul Lynch, petitioner's immediate supervisor, the Office of the Auditor of State has had in effect a long standing policy that examiners are to refrain from discussing pending or completed audits with members of the press. Information relevant to an audit is to be released by the Public Relations Division of the Auditor's Office. The petitioner knew and understood the press relations policy.

The rationale for the press relations policy is directly related to the process by which an audit examination is conducted by the Office of the Auditor of State. The audit review process was explained by both Deputy State Auditor, Charles E. Mauger and the Auditor of State. The examiner-in-charge assigns an audit to a field examiner who begins to gather the necessary documentation for an audit review. At the conclusion of the investigation the examiner-in-charge and the examiner who conducted the audit hold a confidential post audit conference in order to apprise the auditee of the information contained in the draft of the audit. The

auditee has a five-day period in which to respond to any of the statements contained in the draft. The auditee may disagree with the audit and may note his objections to the examiner, examiner-in-charge, or to the Columbus Office of the Auditor of State.

After the conclusion of the five-day response time, the report is received and signed by the examiner-in-charge and forwarded to his respective division in Columbus. At this point, prior to a comprehensive review in Columbus, the audit report is considered a "draft" document. A full-scale mathematical, technical, legal and policy analysis is conducted by members of the Auditor of State's staff. In Columbus, particular emphasis is placed upon legal problems which are referred to staff attorneys for review.

The rationale for the press relations policy is readily understood in light of the audit review process. There are approximately 550 field examiners in 37 offices throughout the State who conduct audits. During the review process in Columbus, the information contained in

the examiner's preliminary draft might change. Since the examiners are not attorneys, the draft could contain legal misconceptions which misstate the law. Mathematical computations could be in error which would require correction. In addition, prior to the time the audit is released by the Auditor of State, the audit is considered a confidential document. The audit and the examiner's work papers become public documents, available on request, only after final review and release by the Office of the Auditor of State. Thus, any release of information prior to final review could potentially be in error.

There are other reasons for the existence of the press relations policy. As acknowledged by the Petitioner, when an examiner conducts an audit, it should be completed in a confidential, cooperative and professional manner. The importance of confidentiality is generally recognized within the audit industry. The petitioner acknowledged that an examiner should recognize the limits of his authority, discretion and professional judgment. The opinion of the examiner may not coincide

with the policy of the Auditor of State. The Auditor of State, as the elected official, establishes the policy. The premature release of audit information breaches this confidentiality and impairs the ability of the elected official to establish a uniform policy throughout the state.

Of special significance is the fact that an auditee is entitled to a confidential post audit conference prior to the release of a final audit report. When an examiner releases damaging information contained in the audit report prior to the initiation of the post audit conference, the examiner has denied the auditee the right to defend himself and offer a possible explanation to the information contained in the audit report.

On December 3, 1978, January 15, 1979, and January 18, 1979, articles appeared in the Cleveland Plain Dealer pertaining to the default of the City of Cleveland. The petitioner believed that these articles damaged his reputation by appearing to place responsibility for the City's default on the petitioner; however, such an inference says more about the petitioner's state of mind

than about the reality of the contents of the press articles. On January 18, 1979, petitioner prepared a one page letter to the Auditor of State which "kindly requested that you and/or William Hart retract 'UNTRUE STATEMENTS PUBLICLY' relative to three subject newspaper articles and also include an additional news release the complete and factual information which you, C. Mauger, and P. Lynch know to be true." (Emphasis in original) An apology was also requested by the petitioner.

Mr. Lynch responded to the January 18, 1979 letter, but the petitioner was dissatisfied with the response. After a lapse of four months petitioner sent a fifty-six (56) page letter with attachments to the Cleveland Plain Dealer on or about May 2, 1979. Petitioner supplemented this document with a three hour interview. As petitioner freely admitted, all of these actions were done without authority from his supervisors and in direct violation of the press relations policy. Petitioner testified that he was well aware on the date that the information was released that he was violating the policy of the Auditor of State.

SUMMARY OF ARGUMENT

There is no justification for certiorari in this case. The matter involves individual relief and presents no issue of national importance.

The legal issue which petitioner is attempting to raise is that of the standard to be used by the judiciary in a case of the removal from employment of a public employee for acts of speech conduct. The national law is settled on this issue in that Pickering, supra, establishes a balancing test.

At every level the Ohio courts discussed and correctly applied the Pickering balancing test to the facts of this case. The record of the case is replete with evidence that petitioner's conduct breached basic principles of confidentiality regarding audits and testimony supports the conclusion that such acts would affect future working relationships with prospective auditees. Under Pickering, supra and subsequent cases, petitioner was properly removed from employment.

Therefore no issue worthly of review by this Honorable Court is presented.

ARGUMENT IN OPPOSITION TO CERTIORARI

This Honorable Court should not grant certiorari in this case as the matter involves only individual relief sought by a disgruntled former employee who has been consistently ruled against by the judicial system of Ohio, from the administration level's initial Order to the Ohio Supreme Court's denial of certiorari. The case does not present any matter of national interest. The Supreme Court does not sit for the benefit of particular individual litigants and certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public interest as distinguished from that of the parties. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

A writ of certiorari is not a matter of right but of judicial discretion. The criteria to be considered in reviewing a petition for a writ of certiorari are set forth at Rule 17 of the Rules of the Supreme Court. None of the factors to be considered under Rule 17 are met in this case. Specifically, Rule 17 provides in relevant part:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The opinions of the Ohio Courts in this case do not reflect any decision of a federal question which in any way conflicts with a decision of another state court of last resort, nor has petitioner alleged any. Neither do the state decisions conflict with the decisions of any federal court. Indeed, the state courts expressly considered and applied Janusaitis v. Middleburg Volunteer Fire, etc., 607 F. 2d 17 (2d Cir. 1979); Ely v. Honatos, 451 F. Supp. 16 (W.D. Va. 1977); Smith v. United States, 502 F. 2d 512 (5th Cir. 1974); and Jensen v. Olson, 353 F. 2d 825 (8th Cir. 1965). See petitioner's Appendix, A43-A45.

More importantly, the Ohio Courts, in this case have not decided any important question of federal law which has not been settled already by this Court. Petitioner's basic contention is that the respondent's decision to terminate his employment was in violation of the First Amendment to the United States Constitution, guaranteeing freedom of speech to all persons. The legal question involved in such an allegation has been settled by this Court in Pickering, supra. The Ohio Court of Appeals considered and applied Pickering to this matter. See Petitioner's Appendix, A7. Therefore the Ohio Supreme Court was correct in dismissing petitioner's appeal as no substantial constitutional question existed. Likewise this Court should deny certiorari under Rule 17 as the law is settled.

The leading case which examines First Amendment rights of public employees is Pickering v. Board of Education, supra. In Pickering, a school teacher wrote a letter to the newspaper criticizing the manner in which the Board of Education had handled past proposals of

raising new revenue for the schools. In assessing the effect of the teacher's statements on the efficient operations of the school systems, this Court noted that the state had valid interests as an employer in regulating the speech of its employees that differed significantly from those it possessed in connection with regulation of the speech of the citizenry in general. This court added:

> The problem in any case is to arrive at a balance between the interest of the [employee]...as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S. at 568.

This court noted that it would be inappropriate to attempt to lay down a general test against which all statements could be judged. Instead, guidelines were established which would form a framework of analysis for examining the controlling interests of the state and the public employee. These interests included:

1. The importance of confidentiality required of the position.

2. Whether the statements were directed toward the individual with whom the petitioner had a close relationship while performing the duties of his position.
3. The degree to which the statements were of a legitimate public concern and important to informed decision-making.
4. The degree to which the statements impeded the ability of the petitioner to perform the duties of his position.

In keeping with the interests to be considered the Ohio Court of Appeals in this case set forth the following factors:

1. Where a public employee is fired for disclosing information to the press, the following factors must be considered in evaluating whether the employee's dismissal is consistent with the First Amendment guarantee of freedom of speech: (1) The public importance of the information disclosed; (2) the truth or falsity of the statements made by the employee, and the employee's knowledge of their truth or falsity; (3) whether the employer has established a

> policy of confidentiality, and the justification for such a policy; and (4) the degree, if any, to which the employee's ability to efficiently perform his or her duties has been impaired by reason of the disclosures. The fourth of these considerations does not condone the termination of a public employee merely because the employee has angered those who are the subject of the disclosures. (Petitioner's Appendix, A3-A4).

Thus that court's holding is completely consistent with the law as settled by this Court in Pickering.

It was stated in the Pickering decision that there may be a sufficient need for confidentiality in some government positions which would furnish a permissible ground for dismissal of employees who violate these confidences. In Hanneman v. Breier, 528 F. 2d 750 (2nd Cir. 1966), the court added that a public employer has a legitimate interest in preserving confidentiality in the conduct of its internal affairs. Confidentiality prevents the publication of inaccurate or misleading information that might result from the premature disclosure of pending matters.

In the present case, as the record shows, the petitioner's behavior which warranted discipline included: the disclosure of confidential information pertaining to post audit conferences; the disclosure of his intention to make "findings for recovery" against various entities, specifically naming one of the individuals involved in the "finding"; and, the discussion of his desire to cite the Mayor of Cleveland for the obstruction of a state audit. Petitioner freely admitted that he disclosed confidential information of post audit conferences and released information of pending audit prior to final approval.

In addition to discussing confidential conversations held at post audit conferences, the petitioner disclosed confidential information relating to the pending audit of the Counsel and Clerk of Counsel for the City of Cleveland. The petitioner stated to a news reporter that a finding for recovery would be made due to violations of the Cleveland City Charter. The information that the petitioner received which formed the basis of his conclusion was a "draft" of the report that he viewed in

Cleveland. This "draft" had not been reviewed by the petitioner's superiors in Columbus and was subject to change. There had been no post audit conference held by these auditees prior to the petitioner's statement. Petitioner's comments to the press that he was planning to cite the Mayor of Cleveland for obstructing a state audit were also made without benefit of a post audit conference or any review of the report by the Auditor of State's staff in Columbus.

Of importance is petitioner's reckless disclosure that a specifically named member of the Civil Service Commission "might" be the recipient of a "finding for recovery". As stated by Auditor Ferguson, "that official might wake up the next morning and find himself on the front page of a paper." The named official had no opportunity to respond to petitioner's charges by discussing the matter with petitioner's supervisors in Columbus. A person's career might have been destroyed by false accusations. The unprofessional nature of such statements and the possibility of difficulty and disruption

for future audits was also testified to by witnesses although it is apparent on its face.

The petitioner's actions are similar to those of a police officer who releases information of a pending investigation to the press. In Ely v. Honatus, supra, the court upheld the dismissal of a policy officer who disclosed confidential information of a pending investigation. The court stated in unequivocal terms:

> . . . the court can conceive of absolutely no justification for discussion by a policy officer of an ongoing criminal investigation with an individual not associated with the department...a police department could scarcely perform in an efficient and productive manner if its individual officers were at liberty to freely discuss specific persons and matters under investigation with members of the public at large. Aside from the obvious tort considerations, the potential for abuse is abundant. The court is simply unable to conclude that the First Amendment must be interpreted so as to protect an individual police officer's publication of substantive elements of a pending criminal investigation. 451 F. Supp. at 21.

In the same manner, there is simply no justification for petitioner's disclosure of confidential matters pertaining to audit investigations.

The Hanneman decision, supra, also pointed out that confidentiality insures that the public will not attribute to the police department statements made by a single police officer. In the present case, petitioner admitted that as an examiner-in-charge of the City of Cleveland, the public perceives him as the representative of the Auditor of State. When the petitioner breaches the confidentiality of the audit process, he has abused his public trust. As stated in Hanneman, confidentiality "prevents the public employee from abusing the public confidence which inheres in his position." 528 F. 2d at 754.

The fact that the petitioner released confidential information to the press would alone tip the Pickering balance in favor of sustaining his removal. His statements were directed towards the individuals with whom he would be in contact in the course of his normal work as a state examiner. As the common pleas court in this case wisely observed:

> Professionalism depends upon the ability to keep confidences. Once a confidence is broken, any person dealing with that individual in a degree of confidence in the future would have to be leery, and, therefore, his effectiveness is substantially impaired. (Petitioner's Appendix, A49-A50).

The petitioner's statements impeded the proper performance of his job duties adversely affecting the efficient operation of the Office of the Auditor of State. Under the settled law his removal from employment was appropriate. Pickering, 391 U.S. at 472; Phillips v. Adult Probation Department, 491 F. 2d 951 (9th Cir. 1974); Kannisto v. City and Courts of San Francisco, 541 F. 2d 841 (9th Cir. 1976); Smith v. United States, 502 F. 2d 512 (5th Cir. 1974).

Further as recently as April 20, 1983, this Court again reviewed and decided the question of the discharge of a public employee who had engaged in speech conduct. In Connick v. Myers, ____ U.S. ____, 103 S. Ct. 1684, ____ L. Ed. ____ (1983), this court held that the discharge of a former assistant district attorney did not violate her constitutionally protected right of free speech. This

Court applied Pickering as the test to be used in Connick, supra. Having so recently considered the question there is no reason or necessity for this Court to take jurisdiction over this matter to reconsider again the same legal questions. As this Court noted, "Government offices could not function if every employment decision became a constitutional matter." Connick, supra, 1688.

As this Court has settled already the principles of law to be used in cases such as this by its decisions in Pickering, supra, and Connick, supra, and as the state courts correctly applied those principles to this case, no question of national importance is presented in this matter to justify a writ of certiorari.

CONCLUSION

The legal issue which petitioner is attempting to raise involves the standard to be used in a case of removal from public employment for speech conduct. This Court has settled the law in that area by its prior decision in Pickering, supra, and has reaffirmed that law in its recent decision in Connick, supra.

This case presents merely the hyperbolic "sound and fury" of one disgruntled, former employee who was correctly and properly removed from public service. There is no issue of general or substantial national public interest presented. Certiorari would only confirm the reasoning and result of the court below.

Wherefore, Respondent asks this Court to deny the writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari has been forwarded to the petitioner through the office of his Counsel of Record, Crede Calhoun, 705 Mall Building, 118 St. Clair Avenue, N.E., Cleveland, Ohio 44114. I further certify that all persons required to be served have been so served. Said mailing was made by depositing the appropriate number of copies in the U.S. Mail, first class, postage prepaid, this _____ day of July, 1983.

B. DOUGLAS ANDERSON
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